United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL WITH AFFIDAVIT OF MAILING

76-6155

To be argued by
CONSTANCE M. VECELLIO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6155

KENNETH O. EKELUND,
Plaintiff-Appellant,

—against—

ELLIOT RICHARDSON, Secretary of Commerce of the United States, ROBERT H. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, ARTHUR B. ENGEL, Superintendent of the United States Merchant Marine Academy, and the United States Merchant Marine Academy,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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Preliminary Statement

This is an appeal by plaintiff Kenneth Ekelund from an order of the United States District Court for the Eastern District of New York (Dooling, *J.*) entered July 20, 1976, denying Ekelund's motion for a preliminary injunction. Ekelund, who was a midshipman at the United States Merchant Marine Academy in Kings Point, New York, was ordered disenrolled from the Academy by order dated June 7, 1976, of defendant Arthur B. Engel, Superintendent of the Academy. The disenroliment followed a disciplinary hearing at which it was established that a quantity of marijuana had been found in Ekelund's room at the Academy on the night of February 20, 1976. On June 9, 1976, Ekelund filed a complaint

in the United States District Court for the Eastern District of New York in which he alleged that the order of June 7, 1976, directing that he be disenrolled should be set aside. Plaintiff alleged that the decision was invalid for two reasons: (1) he claimed that the finding at the hearing was based on evidence seized in violation of his rights of privacy under the Fourth Amendment; (2) he contended that he was denied due process of law at the hearing because he was denied the opportunity to confront witnesses against him.

Plaintiff moved for a preliminary injunction against his disenrollment, and pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, a hearing was held on that motion on June 18, June 21, and June 22, 1976. Following that hearing, the district court rendered its Memorandum and Order of July 20, 1976, which held that plaintiff Ekelund had failed to establish that the order directing his disenrollment was invalid in any way and which denied his request for a preliminary injunction prohibiting the defendants from proceeding with his disenrollment. It is from this denial of preliminary relief that plaintiff Ekelund now appeals.

Statement of Facts

I

On February 20, 1976, in a municipal park in Kings Point, New York, Patrolman Albert Vernaskas of the Kings Point police force arrested two midshipmen from the Merchant Marine Academy, Joseph Byrne and Christopher Franklin, for possession of marijuana. The police reports indicate, and the district court found (A-7),[1] that, under questioning at headquarters by Patrolman Vernas-

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[1] References preceded by the letter "A" are to pages of the Joint Appendix.

kas and Lieutenant Winkelmeyer, Byrne admitted that he "brought his bag of marijuana today for $20, from another cadet, 1st classman Kenneth Ekelund." (A-33). Thereafter, Patrolman Vernaskas proceeded to the Academy and spoke with Lieutenant Timothy Ford. He informed Lieutenant Ford that

> "we had information, reliable information, that a cadet was selling marijuana in the Academy. . . . I told him that the sale was made that day and that my informant stated that the cadet that was selling it did have more marijuana." [2] (Tr. 131) [3]

The regulations of the Academy provide that possession of a dangerous drug (the definition of which includes marijuana) is a Class I offense (A-43) and that a midshipman who is formally charged and found guilty of illegal possession of such a drug is subject to dismissal.[4]

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[2] The district court found that Vernaskas told Lieutenant Ford "that he had reliable information or information from a confidential informant that Ekelund was selling marijuana at the Academy and had a cache of it in his room." (A-8).

[3] References designated "Tr." are to the transcript of the hearing held on the motion for a preliminary injunction. The transcripts of the proceedings of June 18th and 21st, 1976, are consecutively numbered 1-297. The transcript of the proceedings of June 22nd is separately numbered 1-134. References to the June 22nd transcript include the date.

[4] The regulation, which is set forth at A-42, reads in full as follows:

> *01205 DANGEROUS DRUGS*
>
> 1. DEFINITION: For the purpose of this regulation, the term "Dangerous Drugs" will include all forms of stimulant, depressant, hallucinogenic, narcotic and other substances classified as "Dangerous Drugs" by New York State or Federal law.
>
> 2. ACTION: A Midshipman formally charged and found guilty by an Executive Board, convened by the Superintendent, of illegal possession, use or transfer of any dangerous drug, either on board the Academy or ashore, will be subject to lismissal.

The regulations also provided that "Midshipman rooms may be inspected at any time by authorized personnel for purposes of observation of room condition and *to check for violations of USMMA Midshipman Regulations . . .*" (A-44). (Emphasis added).

After receiving authorization from the Commandant of Midshipmen and informing the Commandant that Patrolman Vernaskas intended to arrest Ekelund if marijuana was found in his room, Ford and Vernaskas went to the dormitory. Ekelund was not in his room, and the door was locked. Using a passkey, Ford unlocked the door and showed Vernaskas where to start his search. Inside the room the officer discovered "a quantity of marijuana packaged in plastic bags." (A-29) Later, upon his return to the room, Ekelund was arrested (A-10).

II

Following the discovery of the marijuana, disciplinary proceedings were instituted against Ekelund.

As the district court noted, Article 03101(3)(a) of the Academy Regulations "defines Class I offenses as grave and deliberate violations of the standards of conduct which are completely unacceptable and may result in dismissal, suspension, or other, less severe, authorized disciplinary action, as appropriate." (A-4). Class I offenses are accorded a special procedure (Regulations Article 03103). That procedure is "designed to secure investigation and report to the Superintendent before a letter of formal charges is authorized and thereafter to require a hearing before an Executive Board convened for the case, a recommendation by the Board to the Superintendent, action by the Superintendent on the recommendation, an opportunity for a personal appeal

to the Superintendent in the case of decision of dismissal or suspension, and an appeal to the Assistant Secretary of Commerce for Maritime Affairs." (A-5).

The procedures designed for the investigation of Class I offenses were initiated in Ekelund's case by the preparation by Lieutenant Ford of the Report of Deficiency (A-29) and an accompanying Report of Facts (A-24-A-27) for Midshipman Ekelund, which charged him with violation of Article 02105 of the Midshipmen Regulations, *supra*. The Reports recommended that a Class I offense be found. (A-28) (The Reports also referred to a lesser offense, possession of alcoholic beverages, but since no findings were ever made with respect to this offense, it is of no import in the present action.) The Reports described the arrest of Midshipman Ekelund, as well as describing the possible offenses of eight other midshipmen also involving marijuana.[5] Attached to the Reports were Academy log entries for February 20th and 21st (A-30-A-31) and the police report with respect to the arrests of Ekelund and Midshipmen Byrne and Franklin. (A-32-A139).[6]

An Investigative Report (A-22-A-23) was prepared by a Lieutenant Harry Richards who had been appointed pre-investigative officer (Tr. of June 22 at 15) pursuant to Article 03103 of the Regulations, which, as noted above, deals with the procedure for handling Class I Offenses. It provides that, when an offense has been classified as a Class I offense, the Commandant of Midshipmen shall:

> a. Have the reported violation pre-investigated by a Company Officer other than the Midshipmen's Company Officer.

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[5] The discovery of the possible violation of the Regulations by these Midshipmen occurred during the same time period as the search of Midshipman Ekelund's room, but otherwise has no connection to the case at bar.

[6] The criminal charges against Ekelund were dropped.

The facts in the Investigative Report, as they pertain to Midshipman Ekelund,[7] were based largely on Lieutenant Richards' discussions with Lieutenant Ford. The report notes that "Lt. Ford and Lt. Lyons were witnesses to the search with Midshipmen Gulley and Peterlin observing," and that "Lt. Ford, during a personal interview, confirmed the findings of the search . . . ." (A-22). The report concluded that the offense must be designated Class I, and that Ekelund must be sent before the Executive Board for its review.

The Superintendent, Rear Admiral A. B. Engel, after reviewing the Investigative Report, directed the Chairman of the Executive Board to convene the Executive Board as expeditiously as possible. At the Superintendent's directions, on March 8, 1976, Commander J. N. Hill, the Assistant Commandant of Midshipmen, prepared and delivered a Letter of formal charges (Class I Violation) to Midshipman Ekelund pursuant to the requirements of Article 03103.26 of the Regulations (A-7-A-18). Ekelund returned the endorsement contained on the letter on March 9th, with an "amplifying statement" of "not guilty." (A-18).

On Friday, March 26th, the Executive Board convened to hear Ekelund's case. (A-19). At the hearing, Ekelund was represented by Robert Nishman, Esq., as well as by Lieutenant Jeffrey Peck, an officer at the Academy. *Id.* The case was presented by Commander Hill. *Id.* Lieutenant Ford, Lieutenant Lyons, Ekelund's roommate (Midshipman Truett), and Ekelund himself all testified. Mr. Nishman was allowed to cross-examine all witnesses (A-20). Midshipman Byrne was invited to

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[7] The Investigative Report also refers to the eight other Midshipmen who were simultaneously being investigated for violation of the Regulations.

testify, but declined to do so on the advice of counsel. *Id.* The Kings Point Police declined to make Officer Vernaskas available for the hearing, and the Academy had no power to compel him to appear (A-11).

Following the hearing, the Board reviewed all the evidence which it had received, and, on April 8, 1976, issued its findings. It found "no sufficient explanation or defense for the marijuana found in areas under Midshipman Ekelund's control." (A-21). The Board unanimously found Ekelund in violation of Article 03107, No. 105, entitled "Dangerous Drug, Possession, Sale, or Use Of"—a Class I Offense. The Board recommended disenrollment pursuant to Article 02105. 2. *Id.*

The Superintendent, Rear Admiral Engel, notified Ekelund that he concurred in the finding of the Executive Board and that he would direct his disenrollment unless he requested reconsideration. Ekelund made several personal appeals to the Superintendent, all of which were denied by letter dated May 13, 1976 (A-5). He then appealed to the Assistant Secretary of Commerce for Maritime Affairs. On June 3, 1976, the Assistant Secretary informed both Ekelund and the Superintendent that he adopted and confirmed the final decision of the Superintendent. *Id.* By memorandum dated June 7, 1976, the Superintendent advised Ekelund that his disenrollment was effective on June 9, 1976. Ekelund then instituted this action, alleging that the decision of disenrollment was invalid.

III

Plaintiff's primary claim, at the hearing on the preliminary injunction before Judge Dooling, was that his Fourth Amendment rights had been violated by the inspection of his room on February 20, 1976. The Academy contended, and the district court found, that because of

the regulations allowing frequent room inspections and the actual practice of carrying them out, a midshipman could have no expectation of privacy with respect to items concealed in the room which he occupied (A-14). Ekelund testified both that he knew that the regulations provided for unannounced inspections (Tr. 10) and that such inspections actually took place (Tr. 9). He stated, "Usually during the week if they come in to check for violation of the regulations, they don't usually announce they are coming." (Tr. 9). He further testified that the marijuana was found in "public portions" of the room, that is, portions that "were not secure. If I was going to keep money or something like that, I would not have kept them there." (Tr. 11). He also testified that he knew that two midshipmen officers in each company had master keys and could enter the room (Tr. 12).

Lieutenant Ford, who was first company officer at the time (Tr. 275), testified that he had passkeys to the rooms in the first and second companies (Tr. 279) and that he made unannounced inspections on a daily basis (Tr. 280). He testified that these inspections "vary in form and degree of thoroughness depending on the circumstances which may prompt that inspection. . . . On occasion, it may be necessary to inspect dresser drawers, overhead storage, out of season gear lockers; much more thorough, in other words" (Tr. 281). Ford testified that he had personally conducted inspections which required searching drawers (Tr. 282). He also stated that unannounced inspections were sometimes motivated by "specific problems which come to my attention" (Tr. of June 22 at 41), such as information indicating a violation of the regulations (Tr. of June 22 at 42).

With respect to the reasonableness of his belief, based on what Patrolman Vernaskas told him, that the regulations were being violated, Ford testified that his duties

at the Academy had involved frequent contact with the Kings Point Police and that they had never presented him with information which he later found to be unreliable (Tr. of June 22 at 101).

Much of the testimony at the hearing was devoted to whether the inspection or search[8] was conducted by Patrolman Vernaskas, and hence by the Kings Point Police, or by officials of the Academy. The facts, as found by the district court, are that Lieutenant Ford had explained to Patrolman Vernaskas that the Academy had the right to inspect the midshipmen's rooms (A-8). Ford, after obtaining authorization from the Commandant of Midshipmen, accompanied Vernaskas to Ekelund's room, which was locked. *Id.* Ford unlocked the door and showed Vernaskas where to begin searching (A-9). Lieutenant Ford had meanwhile become involved in an incident across the corridor, which resulted in charges being brought against eight other midshipmen. Lieutenant Lyons had subsequently appeared on the scene. The court found that "Lieutenant Ford's attention and time was taken up with the incident across the corridor, and he and Lieutenant Lyons were not in Ekelund's room during every moment of the search, but Lieutenant Ford was responsible for the identification to Patrolman Vernaskas of the places to be searched and was in earshot of Patrolman Vernaskas when not in Ekelund's room with him. During some or all of the period of the search one of the midshipmen [Peterlin or Gulley] was present as an observer. . . . Some if not all of the marihuana . . . was discovered while Lieutenant Ford was in Ekelund's room . . ." (A-10). The court concluded that "[t]he role of the Academy and its

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[8] Obviously, whether the incident is denominated an inspection or search is not per se of importance. What is controlling is whether Cadet Ekelund could have a reasonable expectation of freedom from inspections or searches of that type.

officials was not to search and seize, or even to authorize the state law enforcement officer's search and seizure . . . What the Academy did was to permit the search, to interpose no obstacle to it, and to assist in it." (A-13).

In denying the motion for the preliminary injunction, the court ruled that "[t]he use in evidence of the product of the search of Ekelund's room was not an invasion of his constitutional rights" (A-11). The ruling was founded on the determination that the search was based on probable cause, exigent circumstances and the "federal status" of the Merchant Marine Academy. *Id.* In addition, Judge Dooling pointed out that the evidence obtained in the search was used in a civil proceeding, where, at best, the benefits to be obtained from extending the exclusionary rule were minimal.

Finally, the court also rejected the claim by Ekelund that he was denied due process at the disciplinary hearing because he was unable to question Midshipman Byrne and Patrolman Vernaskas. It was pointed out that Byrne and Vernaskas could not be compelled to appear. In any event, the court noted, the issue to be determined at the hearing was whether or not Ekelund "was consciously in possession of marijuana in his quarters." (A-16). That question was fully explored through the testimony of Lieutenants Ford and Lyons and Ekelund's roommate.

Issues Presented

The order appealed from here is a denial of preliminary injunctive relief. It is well established that the granting or denial of such relief

> "lies within the sound discretion of the District Court and will not be disturbed unless there is an abuse of that discretion, *Doran* v. *Salem Inn, Inc.*,

> 422 U.S. 922, 931-932, 95 S.Ct. 2561, 2567-2568, 45 L.Ed. 2d 648, 659-660 (1975), or unless there is a clear mistake of law, *414 Theater Corp.* v. *Murphy*, 499 F.2d 1155, 1159 (2d Cir. 1974); *Exxon Corp.* v. *City of New York*, 480 F.2d 460, 464 (2d Cir. 1973)."

Triebwasser & Katz v. *American Tel. & Tel. Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976). Furthermore, this Court, in describing the standard to be applied by the district court in determining whether to grant or deny preliminary relief, has emphasized that the movant must show irreparable harm and "that such preliminary injunctive relief can be awarded only upon a *clear* showing that the movant is entitled to the relief . . . and that in making such a showing the movant bears a heavy burden. . . ." *State of New York* v. *Nuclear Regulatory Commission*, — F.2d —, slip op. 6175, 6185 (2d Cir., Feb. 14, 1977).

In the case at bar, Judge Dooling concluded that plaintiff had not made a clear showing that he was entitled to the relief he sought. Plaintiff's arguments, in this appeal, that he was entitled to the preliminary relief he sought are essentially two.

First, plaintiff argues that the decision of disenrollment of which he complains was based on evidence resulting from an unconstitutional search of the room which he occupied at the Academy. He argues that the search was an unreasonable search within the meaning of the Fourth Amendment and that the Amendment requires that any evidence seized as a result of that search be excluded from the administrative proceedings which resulted in his disenrollment. The Academy responds that appellant Ekelund had no reasonable expectation that the room which he occupied at the Academy would not be subject to

searches of the type which took place on February 20, 1976. The Academy further argues that the search was a reasonable exercise of the Academy's duties, both as an educational and a quasi-military institution. The Academy also contends that the Kings Point Police, who actually carried out the search, had probable cause to institute the search and were justified in not obtaining a search warrant. Finally, the Academy submits that, even if the search is characterized as an illegal search by the Kings Point Police, the exclusionary rule should not be applied to an administrative hearing at a federal educational institution.

Plaintiff's second argument is that the administrative hearing which preceded his disenrollment did not comport with the requirements of due process because hearsay evidence, in the form of police reports, was considered by the Executive Board. The Academy argues that hearsay evidence is admissible in an informal hearing of this type particularly where, as in the case at bar, eyewitnesses to the crucial events also testified at the hearing.

ARGUMENT

POINT I

The District Court Was Correct In Holding That The Search Of Appellant's Room Was Not Violative Of His Rights Under The Fourth Amendment.

A. The Expectation Of Privacy

Appellant, in arguing that the search of his room on February 20, 1976, was an unreasonable search within the meaning of the Fourth Amendment, must contend that he held a reasonable expectation that the room which he occupied at the Academy would not be subject to searches

of the type which occurred on that day. The Academy asserts, however, that Cadet Ekelund in fact knew that his room could be and, in fact, often was, the subject of searches of this type, and that he neither had nor reasonably could have had the expectation that it would be free from such searches.

The ability of a person to claim the protection of the Fourth Amendment depends upon whether that person can show that the searched area was a place where he was entitled to "a reasonable expectation of freedom from governmental intrusion". *Mancusi* v. *De Forte*, 392 U.S. 365, 368 (1968). Thus, in *Katz* v. *United States*, 389 U.S. 347, 361 (1967), Justice Harlan, in a concurring opinion, described the elements which must exist for the protections of the Fourth Amendment to apply; "first, that a person have exhibited an actual expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." Neither of these requirements is met in the case at bar because searches of the type involved were provided for by the Academy regulations and actually took place on a regular basis. Moreover, Cadet Ekelund was aware both of the regulations and of the practice of carrying out the searches.

We do not contend that Cadet Ekelund had *no* expectation of privacy in the room he occupied at the Academy. It would be reasonable, for example, for him to expect that the conversations which he carried on in the privacy of his room were not being taped, just as it was reasonable for the defendant in *Katz* v. *United States*, *supra*, to assume that the "uninvited ear" was being excluded from his telephone calls made from a public booth. However, the defendant in *Katz* could not reasonably assume that the "intruding eye" was excluded from the public phone booth. *Katz* v. *United States*, *supra* at 352. Similarly, it would *not* be reasonable for Cadet Ekelund to ex-

pect that the room which he occupied and its contents would be free from searches of the type that occurred. Thus, the search which occurred on February 20, 1976, was not a violation of "privacy upon which he justifiably relied. . . ." *Katz* v. *United States, supra*, at 353.

Article 08201.2 of the Regulations of the Academy provides, in pertinent part, as follows:

> 2. *CONDITION OF ROOMS*:
>
> Midshipman rooms may be inspected at any time by authorized personnel for purposes of observation of room condition and *to check for violations of USMMA Midshipmen Regulations* . . . . (Emphasis added.) (A-44).[9]

Article 08203 is entitled inspection of Rooms; Part 1 thereof provides as follows:

> 1. *GENERAL*: Midshipman rooms may be inspected at any time by authorized personnel. (A-45).

Midshipman Ekelund testified that he was aware of the fact that the regulations provided for unannounced room inspections and that in fact such inspections were frequently made. (Tr. 9-10). (Lt. Cdr. Ford testified that the inspections varied in extent depending on the reason for the inspection, but that he had in fact searched drawers as part of an inspection.) (Tr. 282). Cadet Ekelund also acknowledged that numerous persons, including midshipmen officers, had passkeys to his room.[10] (Tr. 12). The district court correctly concluded, we submit, that with respect to the expectation of privacy, a mid-

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[9] Possession of marijuana is a violation of the Regulations. (A-42, A-43).

[10] Midshipmen officers are authorized to inspect rooms. (A-45).

shipman at the Academy "could have little if any such expectation." (A-14).[11]

The situation at the Academy reflects a well-established principle that, in many respects, members of the military have a different expectation of privacy than do civilians. The military character of the Merchant Marine Academy was recognized by the Second Circuit in *Wasson* v. *Trowbridge*, 382 F.2d 807, 809 (2d Cir. 1967), which noted that

> "because of the *vital national interest* served by the merchant marine and the *hazards which are commonly encountered*, it accurately may be said that the responsibilities of merchant marine personnel are comparable to those of the Navy and Coast Guard." (Emphasis added)

In *Committee for G. I. Rights* v. *Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975), in determining whether warrantless drug inspections violated the Fourth Amendment rights of the soldiers involved, the D.C. Circuit recognized

> "that GI's are entitled to the protection of the Fourth Amendment as are all other American citizens. As the Court noted in *Terry* v. *Ohio*, 392 U.S. 1, 9 . . ., however, the 'specific content

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[11] The regulations in *Piazzola* v. *Watkins*, 442 F.2d 284 (5th Cir. 1971), and *Smyth* v. *Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975), upon which appellant relies, were significantly different from the regulations in effect at the Academy. The Academy regulations provide for room inspections on a daily basis. In *Smyth*, the regulations provided that "it is occasionally necessary for the college to exercise its right of room entry." 398 F. Supp. at 782. In *Piazzola*, the regulation provided that "[t]he college reserves the right to enter rooms for inspection purposes." 442 F.2d at 286. Furthermore, in neither case does evidence appear that inspections or searches were actually made on a regular basis, as they were at the Academy.

> and incidents of [one's rights under the Fourth Amendment] must be shaped by the context in which [they are] asserted.' Reasonableness is the controlling standard."

The court in *Committee for G.I. Rights* concluded that the warrantless drug inspections involved in that case were constitutionally permissible, noting that

> "[t]he 'expectation of privacy' . . . is different in the military than it is in civilian life. Military inspections have been traditionally accepted and are expected by soldiers."

518 F.2d at 477.

In *United States* v. *Grisby*, 335 F.2d 652, 654 (4th Cir. 1964), the Fourth Circuit, in considering the validity of a warrantless search of a home on a military reservation, similarly concluded that the expectation of privacy was less in the military than in civilian life: "The sergeant who inspects the barracks neither seeks nor obtains permission of the corporals and privates serving under him, and it would be a grave affront to military discipline if they undertook to exclude him."

Of course, even in civilian life, a relevant consideration in determining whether a search was reasonable is whether the situation was such that there was a reasonable expectation of privacy. In *Shaffer* v. *Field*, 339 F. Supp. 997 (C.D. Calif. 1972), *aff'd.*, 484 F.2d 1196 (9th Cir. 1973), the court was presented with the question of whether a warrantless search of a sheriff's locker at the sheriff station was reasonable. The court concluded that the sheriff had no reasonable expectation of privacy in the locker. It enumerated the factors to be considered in making such a decision, including the following:

> "whether there exists any regulation or practice which should have put petitioner on reasonable notice that his locker could be examined by others without his consent." 339 F. Supp. at 1003.

The court emphasized that the commander of the station kept a master key to the lockers. A similar result was reached in *United States* v. *Donato*, 269 F. Supp. 921 (E.D. Pa. 1967), *aff'd.*, 379 F.2d 288 (3d Cir. 1967), which involved the search of the locker of an employee in a United States mint. In that case the court emphasized the existence of a regulation establishing that mint lockers were not to be considered private lockers, that the lockers were subject to inspection, and that the security guards had a master key—factors which should have put the employee on notice that his locker was subject to search. All these factors apply to cadets' rooms at the Academy.

Appellant Ekelund, in contending that he did have a reasonable expectation of freedom from searches of the type which occurred on February 20th, seeks to emphasize that the search was primarily carried out by a member of the Kings Point police force.[12] He states, at p. 7 of his brief, that he "is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures in his dormitory room when such searches are initiated and conducted by law enforcement officials without a warrant and *with the intent to find contraband for use in a criminal prosecution.*" (Emphasis added).

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[12] As the district court noted, the Regulations specifically provided notice to midshipmen that, with respect to violations of state or federal drugs laws, the Academy "shall in no way provide protection from the law." (A-14). In contrast in *Smyth* v. *Lubbers*, *supra*, 398 F. Supp. 777, upon which appellant relies, the regulations specifically provided that "[s]tudent rooms may be entered and searched by county and state officials only after a search warrant has been presented stating the reason for the search." 398 F. Supp. at 782. Two of the officials who conducted the search in *Smyth* were local deputy sheriffs. *Id.*

We submit that the search was valid even if it were considered to be solely a search by the police "with the intent to find contraband for use in a criminal prosecution." [13] Indeed the search served *dual* purposes. While the district court found that the search "was a search by a state law enforcement officer . . ." (A-12), it also found that "[w]hat the Academy did was to permit the search, to interpose no obstacle to it, and to assist in it." (A-13). The court noted that either Lieutenant Ford, Lieutenant Lyons, or a midshipman officer "[d]uring some or all of the period of the search . . . was present as an observer and may have lent some mechanical assistance." (A-10). Lieutenants Ford and Lyons testified as to their observations at the Executive Board hearing (A-19). Thus, while from Patrolman Vernaskas' point of view the purpose of the search may have been to "find contraband for use in a criminal prosecution," the search clearly had another purpose from the point of view of the Academy; namely, the enforcement of Academy regulations. In *Biehunik* v. *Felicetta*, 441 F.2d 228, 230 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971), this Court considered the validity of a compulsory line-up [14] ordered by the Buffalo Police Commissioner. One purpose of the line-up was the identification of certain policemen so that they might be subject to administrative sanctions, but the order itself noted that "there is the possibility of resulting criminal prosecutions. . . ." *Biehunik* v. *Felicetta*, *supra* at 229. This Court pointed out that responsible officials need not be hampered in their efforts to impose discipline in their organization "merely because measures appropriate to those ends would be improper if they were directed *solely* toward the objective

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[13] See point I.C, *infra*.

[14] The line-up was considered to be a seizure within the purview of the Fourth Amendment.

of criminal prosecution." *Id.* at 230. (Emphasis added). This observation is particularly apposite in this case, for here, for purposes of discipline, the Academy officials had just as great an interest in the search as the Kings Point Police.

Appellant attempts to rely on *Piazzola* v. *Watkins*, 442 F.2d 284 (5th Cir. 1971), to establish that a student in a university has a reasonable expectation of freedom from a search by the police "with the intent to find contraband for use in a criminal prosecution". However, that case was a habeas corpus proceeding brought by a student who had in fact been criminally tried and incarcerated. To the extent that a search of a student's room by police can serve *dual* purposes, *Piazzola* involves the purpose of finding contraband "for use in a criminal prosecution." In *Biehunik* v. *Felicetta*, *supra*, at Fn. 5, this Court explicitly noted that the fruits of the identical search which were held inadmissible in *Piazzola* were held admissible in a university expulsion proceeding in *Moore* v. *Student Affairs Committee of Troy State University*, 284 F. Supp. 725 (M. D. Ala. 1968).[15]

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[15] The numerous cases from the United States Court of Military Appeals on which appellant relies are similarly inapposite. Appellant states, at p. 12 of his brief, that the decisions of that court make it clear that Fourth Amendment protections apply "when *the purpose* of the search is to locate contraband for use in a criminal proceeding." All of the cited cases involve court marshalls where criminal sanctions were, of course, imposed. While the Academy is a quasi-military institution, it is also an educational institution which has the duty of enforcing "reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process . . .," *Moore* v. *Student Affairs Committee of Troy State University*, *supra*, at 729, and the search in question in the case at bar was clearly used for *that* purpose by the Academy, as well as for the purpose, discussed *infra*, of ensuring the "fitness for duty of those who would assume responsibility in the Merchant Marine."

B. The Reasonableness of the Search

Assuming *arguendo* that Cadet Ekelund had a reasonable expectation of being free of searches of the type which occurred on February 20th, the courts have long recognized that in situations involving an important governmental purpose, they must weigh "the governmental interest in the particular intrusion against the offense to personal dignity and integrity." *Biehunik* v. *Felicetta*, *supra*, at 230. In *Wasson* v. *Trowbridge*, *supra*, 382 F.2d 807 at 809, this Court assessed the "vital national interest" served by the merchant marine. It noted:

> In particularly vital and sensitive areas of government concern such as national security and military affairs, the private interest must yield to a greater degree to the governmental . . .
>
> Although the private interest affected in this case may appear to be more substantial than in [the case of a state university] because the alternatives available to a student expelled from a state university are not available to Wasson, nevertheless *the essential characteristics of fitness for duty of those who would assume responsibility in the Merchant Marine cannot be overestimated* . . . and the substantiality of the government interest here involved is entirely clear." 382 F.2d at 812. (Emphasis added).

Thus, the governmental interest which the Court must weigh in the case at bar is the duty of the Academy to instill in its cadets "the essential characteristics of fitness for duty of those who would assume responsibility in the Merchant Marine" as well as its general duty to operate as an educational institution. In *Biehunik* v. *Felicetta*, *supra*, this Court noted that where an individual chooses

to be part of an institution designed to implement a substantial governmental interest, he "may not reasonably expect the same freedom from governmental restraints which are designed to ensure his fitness for office as from similar government actions not so designed." *Biehunik* v. *Felicetta*, *supra* at 231. In *Biehunik*, this Court concluded that the seizure involved there was "reasonable under the particular circumstances even though unsupported by probable cause." *Id.* at 230. The Academy contends that the same standard should apply to searches of rooms at the Academy which are for the purpose, or have the effect, of protecting policies which are designed to instill "the essential characteristics of fitness for duty." [16] It also contends the search of Cadet Ekelund's room was eminently reasonable, given the information which Patrolman Vernaskas had obtained from Cadet Byrne and which he had conveyed to Lieutenant Ford.

Even in the case of state universities, where the governmental interest is less substantial than at the Academy, the courts have consistently balanced that interest against the student's "expectation of privacy" in arriving at a definition of what constitutes a reasonable search. In *Moore* v. *Student Affairs Committee of Troy State University*, *supra*, 284 F. Supp. 725, the plaintiff was a student who had been expelled from a state university after a warrantless search of his room by agents of the State of Alabama Health Department, Bureau of Primary Prevention, had revealed marijuana concealed therein. The agents were accompanied by the Dean of Men at the university, from whom they had obtained permission to search certain rooms.

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[16] The Academy does contend, however, that there was probable cause for the search of Cadet Ekelund's room. See Point I. C, *infra*.

There was a regulation in effect providing that the college reserved the right to enter rooms for inspection purposes. The court noted that students in a state university have a right to be free from *unreasonable* searches and cannot be forced to waive that right. But it also noted that

> "[t]he college, on the other hand, has an 'affirmative obligation' to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. . . . The validity of the regulation authorizing search of dormitories . . . is determined by whether the regulation is a reasonable exercise of the college's supervisory duty." 284 F. Supp. at 729.

The court in *Moore* held that the regulation involved in that case was reasonable as to any search "based on a reasonable belief on the part of the college authorities that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline.' 284 F. Supp. at 730. It specifically held that this standard was lower than the criminal law standard of probable cause. *Id.*

Thus, even assuming that plaintiff Ekelund had any reasonable expectation of freedom from searches in his room at the Academy under the reasoning of *Moore*, that expectation, and the concomitant rights, must yield to the rights of the Academy both to "protect campus order and discipline" and to instill "the essential characteristics of fitness for duty" in its cadets. It cannot be questioned that the prohibition against the possession of dangerous drugs is a regulation designed to promote both these goals, particularly when the possession also constitutes a crime under state law.

Furthermore, the court in *Moore* based its decision on a line of cases under which "[i]t is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with the responsibility of maintaining discipline and order or of maintaining security." 284 F. Supp. at 730-731. The only factor in *Moore*, as in the case at bar, distinguishing it from that line of cases was the participation of local police in the search. However, in the case at bar, as in *Moore*, the search served a dual purpose, since it was conducted only with the approval of, and under the supervision of, the officials of the institution. Furthermore, in *Moore*, as in the case at bar, the fruits of the search were being used in an administrative proceeding,[17] the purpose of which was to "protect campus order and discipline." A different question would be presented if the fruits were used in a criminal proceeding against Midshipman Ekelund. In *Biehunik* v. *Felicetta*, *supra*, the purpose of the line-up was the identification and administrative sanction of policemen who had assaulted civilians, but the order also referred to a possible criminal prosecution. The court noted that

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[17] *Smyth* v. *Lubbers*, *supra*, 398 F. Supp. 777, which involved the warrantless search of a college dormitory resulting in the finding of marijuana, represents an instance of a court requiring "probable cause" before the fruits of a search were admissible in this type of administrative proceeding. The court in *Smyth* essentially rejected the balance of interests arrived at by the court in *Moore*, finding that the college's need for order and discipline did not justify the search in question. However, the Court specifically noted that the college was "unlike military or quasi-military organizations, where the need for discipline is more acute than in civilian society." 398 F. Supp. at 789. Furthermore, as noted above, the regulations of the college specifically provided that student rooms could be searched by county and state officials "only after a search warrant has been presented stating the reason for the search." *Id.* at 782.

> [t]he line-up was ordered by that official of the police department charged with running an efficient and law-abiding organization . . . and was clearly and highly relevant to the legitimate end of assuring his employees trustworthy performance of their assigned tasks. Commissioner Felicetta's reference in his order directing the line-up to a possible criminal prosecution did not dilute the potential criminal usefulness of the line-up in administering disciplinary measures. 441 F.2d at 231.

C. The Failure of the Police to Obtain a Warrant Did Not Render the Search Illegal

The district court found that the Academy's role in the search was "to permit the search, to interpose no obstacle to it, and to assist in it," (A-13); it also found that the search was by the state authorities, noting that they had "ample evidence to support the search." (A-11). The Academy contends that it was present at and observed the search for purposes of its own (that is, for purpose of determining whether the regulations of the Academy were being violated) and that, from the Academy's point of view, the search was justified by the regulations permitting room inspections and by its actual practice of conducting such inspections. However, even if the purpose of the police—i.e., the obtaining of evidence for use in a criminal prosecution—is viewed as the sole purpose of the search, we believe that the requirement of obtaining a search warrant was obviated by the "exigent circumstances" of the situation.[18]

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[18] As noted above, while the Academy contends that, for its purposes, the search was reasonable within the meaning of the Fourth Amendment if it had reasonable cause to believe that its regulations were being violated, it also contends that there was

[Footnote continued on following page]

Judge Dooling noted that "[t]he stock of marijuana that a midshipman could have in his room could be expected to be modest and fast moving. And the fact of the arrest of Byrne and Franklin could be expected to reach the Academy quickly and alarm the midshipman Byrne named as his supplier. The search was based on probable cause, and the exigent circumstances and federal status [19] of the place to be searched excused the police from seeking a warrant" (A-12).

In *United States* v. *Santana*, — U.S. —, 96 S.Ct. 2406 (1976), the Supreme Court recently expanded the definition of the kind of "exigent circumstances" which make it reasonable for the police to conduct a search without seeking a warrant. In *Santana*, the Court upheld a warrantless search of the defendant's house which had resulted in the discovery of narcotics and marked money.

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in fact "probable cause" for the search. The district court noted that the police had "ample evidence to support the search." (A-11). Patrolman Vernaskas had, only a few hours before the search, arrested two cadets from the Academy for possession of marijuana; one of those cadets had stated that he had purchased the marijuana from another cadet at the Academy, Midshipman Ekelund, that very day. (A-33).

[19] Appellant asserts, at p. 18 of his brief, that the reliance of the district court on the "federal status of the place to be searched" as one factor in excusing the state police from obtaining a warrant is "without logic." However, it is clear that the very confusion referred to by appellant in his brief as to whether state or federal officials had authority to issue a warrant, and the unfamiliarity of the state police with the procedures for obtaining a federal search warrant, would have made the process of obtaining a warrant more time consuming and would thus have extended the time within which word of the arrest of cadets Byrne and Franklin could spread to the Academy.

Furthermore, Patrolman Vernaskas demonstrated his good faith by first obtaining the permission of Academy officials for the search.

The Court emphasized that "there was . . . a realistic expectation that any delay would result in destruction of evidence." *United States* v. *Santana*, *supra*, at 2410. It cannot be disputed in the case at bar that there was a "realistic expectation" that the delay involved in obtaining a search warrant would result in the destruction of evidence. Thus, Patrolman Vernaskas was justified in searching the room at the Academy occupied by Cadet Ekelund without first obtaining a warrant.

POINT II

The District Court Was Correct In Holding That The Exclusionary Rule Should Not Apply To A Civil Administrative Hearing In A Federal Educational Institution.

Even if this Court decides that the search of Cadet Ekelund's room must be viewed as having been conducted solely for the purpose of obtaining evidence for a criminal prosecution by the State of New York, and that the local police acted improperly in conducting the search, the Academy contends that no useful purpose would be accomplished by excluding the fruits of that search from the administrative proceeding conducted by the Academy. The purpose of that proceeding was to determine whether Cadet Ekelund had violated the regulations of the Academy and whether he possessed the charteristics necessary to become an officer in the United States Merchant Marine or whether he should be disenrolled from the Academy. As the Supreme Court stated in *Elkins* v. *United States*, 364 U.S. 206, 217 (1960), the purpose of the exclusionary rule is to deter unlawful police conduct and not to redress the injury to the privacy of the search victim: "The rule is calculated to prevent, not to repair." Thus, the Court has never interpreted the rule

to prohibit all uses of illegally seized evidence in all proceedings. "[T]he rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964). The deterrent effect on the police of excluding illegally seized evidence in an administrative hearing at a college or academy is speculative at best, but it becomes even more speculative when the institution is operated by a different sovereign than that which employs the police. Indeed, the deterrent effect on the police of excluding illegally seized evidence from any *civil* proceeding is doubtful, and its application in that context has recently been laid to rest by the Supreme Court in *United States* v. *Janis*, — U.S.—, 96 S. Ct. 3021 (1976). The Court's rationale is particularly applicable in this case:

> "Clearly, the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule and, as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable.
>
> In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred. In this case it is the state officer who is the primary object of the sanction. It is his conduct that is to be controlled. Two factors suggest that a sanction in addition to those that presently exist is unnecessary. First, the local law enforcement official is already 'punished' by the exclusion of the evidence in the state criminal trial. That, necessarily, is of substantial concern to him. Second, the evidence is also excludable in the federal criminal trial, *Elkins* v. *United States*, *supra*, so that the entire criminal enforcement process, which is the concern and duty of these officers, is frustrated."

96 S. Ct. at 3029.

It is stating the obvious to point out that no deterrent function vis-a-vis the Kings Point Police would have been served by excluding evidence of the marijuana from Ekelund's disciplinary proceeding.

Appellant contends, as he must, that the case at bar does not come within the reasoning of *Janis*. First, he argues that the Academy was not a "mere recipient" of the evidence but was a participant in the search. First, it must be noted that the district court found, and appellant has apparently conceded, that

> "[t]he role of the Academy and its officials was not to search and seize, or even to authorize the state law enforcement officer's search and seizure. . . . What the Academy did was to permit the search, to interpose no obstacle to it, and to assist in it." (A-13).

Secondly, the point emphasized by the Court in *Janis* was that the sovereign which was a mere recipient had engaged in no illegal activities which could be deterred by the application of the exclusionary rule. But, in the case at bar, it is conceded that, to whatever extent Academy officials participated in the search, the search was a legal exercise of their rights under the Academy's regulations.[20] Thus, the Academy officials engaged in no illegal conduct which could or should be deterred.

Appellant also argues that the administrative proceeding involved here was essentially a criminal action, and hence that *Janis* is inapplicable. Appellant relies on *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693

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[20] See p. 10 of appellant's brief, where he argues that his expectation of privacy in his room at the Academy entitled him "to be free from unreasonable searches and seizures *conducted by police officials*. . . ." (Emphasis added).

(1965), an action arising under a statute allowing for the forfeiture of an automobile used in violation of the criminal law. There the Supreme Court expressly relied on the fact that "forfeiture is clearly a penalty for the criminal offense." *Id.* at 701. However, as Judge Dooling noted in the case at bar, while disenrollment is a serious matter,

> "in no true sense is the proceeding punitive or vindictive, nor is it a forfeiture proceeding. Rather, it is a determination of unfitness for training for command rank in the merchant marine." (A-15).[21]

In sum, since the search was conducted primarily by a sovereign other than the federal government, since the actions of the Academy officials, to whatever extent they participated in the search, were proper, and since the disenrollment proceeding is a civil proceeding, there is no merit to the argument that the exclusionary rule should have been applied by the Academy.

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[21] As this Court noted in *Wasson* v. *Trowbridge, supra,* at 809, "The Merchant Marine Academy . . . is the instrumentality of the federal government charged with the responsibility of training the officers of the United States Merchant Marine."

POINT III

The District Court Was Correct In Holding That Appellant Was Not Denied Due Process Of Law In The Administrative Proceeding.

Appellant claims that he was denied due process of law at the administrative hearing because hearsay evidence was admitted at that hearing—i.e., police reports concerning the events leading up to and following his arrest.[22] However, as this Court noted in *Hagopian* v. *Knowlton*, 470 F.2d 201, 207 (2d Cir. 1972), "due process is not a rigid formula or simple rule of thumb" but rather is "a flexible concept which depends upon the balancing of various factors. . . ."

In *Wasson* v. *Trowbridge*, *supra*, 382 F.2d 807, the requirements of due process with respect to the dismissal of a cadet from the Merchant Marine Academy were set forth: "that he be given a fair hearing at which he is apprised of the charges against him and permitted a

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[22] The reports considered by the Executive Board (listed at A-21a) consisted of the following:

1. Police General Report 56 and Supplement—A-32-A-37 (described as Enclosure 5 to Executive Board Findings);
2. Arrest form—A-38-A-39 (described as Enclosure 6 to Executive Board Findings);
3. Scientific Investigation Bureau Report—A-41 (described as Exhibit 8 to Executive Board Findings).

Enclosure 7 to the Executive Board Findings, at A-40, is merely a memorandum of a telephone conversation between Police Chief Frank Hartz and Lt. Richards, whereby Lt. Richards verified that the "police report of February 20, 1976" was in fact an official police report, and that the persons who had made the incriminating statements reported therein "were read their rights."

defense." 382 F.2d at 812. Appellant in the case at bar was given a hearing by an unbiased Board. He was represented by counsel from the very beginning of the investigation of the offense in question. He received copies of all relevant documents which the Board considered. He has made no allegation that there were witnesses whom he wished to call but was not allowed to call. He based his whole claim that the hearing did not comply with the requirements of due process on the fact that the police officers.[23] who prepared the relevant reports did not appear at the hearing and hence could not be cross-examined. He concedes that the *Academy* did not prevent him from calling the officers as witnesses, and notes, at p. 28 of his brief, that the Academy does not have subpoena power. At the hearing on the preliminary injunction, Commander Tyson testified that it was not the policy of the Kings Point Police Department to release their officers for the purpose of testifying at hearings at the Academy (Tr. 101). Appellant's suggestion that the Academy could have remedied this situation simply by rescheduling the hearing is misplaced.[24]

While appellant casts his argument in terms of being denied "adequate opportunity to cross-examine or present

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[23] While the reports were primarily prepared by Patrolman Vernaskas, Lt. Winkelmeyer prepared part of them (A-33), and both he and Vernaskas heard Cadet Byrne state "that he bought his bag of marijuana today for $20 from another cadet, 1st classman, Kenneth Ekelund." *Id.*

[24] Appellant's statement, at p. 28 of his brief, "that it was indicated by Chief Hartz that the police officer was not available on the date of the hearing because it was his day off (see A-40)," apparently results from a misunderstanding of Enclosure 7 (A-40) which, as described in footnote 19 above, merely constitutes the results of Lt. Richards' efforts to verify the accuracy of the police reports. (Lt. Richards was the officer charged with the responsibility of submitting an Investigative Report, on the basis of which it was determined that an Executive Board hearing should be scheduled.)

his defense," (appellants brief, p. 27), it is essentially an objection to the use of hearsay evidence, since the historic objection to the use of hearsay is that there is no opportunity to cross-examine. But *Wasson* clearly provided that "[t]he hearing may be procedurally informal and need not be adversarial." 382 F.2d at 812. And, as the district court emphasized, the police reports were in large part merely repetitive of evidence presented as testimony and subject to cross-examination at the hearing:

> "But so far as plaintiff Ekelund was concerned, the critical issue was whether or not he was consciously in possession of marihuana in his quarters. On that issue Lieutenant Ford was an eyewitness called to be cross-examined and contradicted by plaintiff, and plaintiff was able to and did call his roommate as a witness. Lieutenant Lyons was present at part of the search and was also called as a witness and cross-examined. It is evident that the hearing officers were confronted with an issue of credibility and that they did not believe plaintiff Ekelund."

(A-16).

Appellant, who was represented by counsel, was given more than adequate time to prepare his defense. In a lengthy hearing and a lengthy appeal process, he was given the opportunity to present that defense and cross-examine those who testified against him. Appellant can claim no denial of due process because of the fact that the Executive Board nevertheless found the evidence against him convincing.

CONCLUSION

The order of the district court denying the motion for the preliminary injunction should be affirmed.

Dated: Brooklyn, New York
April 29, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Stanley, Teitler being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of May 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

KUNSTLER & HYMAN, 370 LEXINGTON AVE., N.Y.C. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

2nd day of May 19 77

Martha Schaer

MARTHA SCHAER
Notary Public State of New York
Qualified in Queens County
Commission Expires March 30, 19 77